

Shrestha (Migration) [2019] AATA 3878 (2 September 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Sumani Shrestha
CASE NUMBER:	1607088
DIBP REFERENCE(S):	BCC2012/798157
MEMBER:	Danielle Galvin
DATE:	2 September 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Skilled (Residence) (Class VB) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 886 (Skilled - Sponsored) visa: • Public Interest Criterion 4020(1) for the purposes of cl.886.225 of Schedule 2 to the Regulations. • • • Statement made on 02 September 2019 at 10:12am

CATCHWORDS

MIGRATION – VB Skilled (Residence) (Class VB) visa – Subclass 886 (Skilled - Sponsored) – hairdresser – no bogus document or false or misleading information – delegate did not identify bogus information – payment and hours of employment could not be verified – lack of formality in payment records for small salon plausible – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65, 97

Migration Regulations 1994 (Cth), Schedule 2, cl 886.225, Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 7 May 2016 to refuse to grant the applicant a Skilled (Residence) (Class VB) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 18 July 2012. On the 7 May 2016 the delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.886.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because, on the evidence before them, they found that the applicant had given a bogus document within the meaning of s.97 of the Act and therefore did not meet Public Interest Criterion (PIC) 4020, subclause 4020(1). Consequently the requisite criteria of cl.886.225 were not met and the visa application was refused.
5. The delegate formed the view that evidence submitted with the application was “non-genuine” in nature. This evidence related to the applicant’s claim that they had worked as a qualified Senior Hairdresser with Mijala Beauty Parlour and Training Centre for 900 hours in order to obtain a skills assessment. The dates claimed for this employment were 18 July 2005 to 25 April 2007. A work reference, dated 21 October 2009, detailing her roles and responsibilities was signed by the business’ owner, Gyani Maiya Maharjan, (the owner). The Department was also in receipt of a letter dated 24 September 2015 from the owner stating that the applicant was paid in cash and no contribution was made to a provident fund on her behalf.
6. Staff from the Department contacted, by telephone, the owner and they deduced that the business was very small and at that time there was only one other staff member. The owner claimed that the applicant had worked for her as a hair stylist.
7. The department received the following documents from the applicant:
 - Statutory declaration of the applicant;
 - Statutory declaration of the owner advising that her English is limited, that records were not kept via computer and given the passage of time her memory was compromised. She claimed that before the earthquake she employed 2-3 staff and following the quake she employed only one employee. The Tribunal notes that the earthquake that struck Nepal occurred in April 2015;
 - Statutory declaration of current employee of the owner’s business;
 - Customer statutory declarations;
 - Nepalese citizenship certificate of Kamala Gurung;
 - Work reference dated 21 October 2009;
 - Employment reference letter dated 24 September 2015 in relation to method of payment.
8. On 12 September 2018 the Tribunal invited the applicant to comment on or respond to the reason for the Department’s decision requiring a response by 26 September 2018. The

information put to the applicant was the basis for the Department's refusal. The agent for the applicant responded in writing on 14 September 2018.

9. The agent stated that the applicant had performed the work as claimed to have been performed in the employment reference letters dated 21 October 2009 and 24 September 2015 from the owner and that the applicant had not provided any bonus document or information that was false or misleading in a material way to the Department.
10. On 19 November 2018 the agent sent to the Tribunal further documentation including:
 - Successful migration skills assessment application result for the occupation of hairdresser dated 16 July 2012;
 - Letter from owner dated 21 October 2009 describing the duties of the applicant whilst engaged as a hairdresser;
 - Letter from the owner dated 24 September 2015 certifying that the applicant was engaged as a hairdresser by her and conforming that pay slips were not provided and that contributions were not made to a provident fund. The applicant was paid in cash;
 - Statutory declaration of the owner declared on 21 April 2016 confirming that the contents of her letters dated 21/10/09 and 24/9/15 was accurate and clarifying discussions with the department;
 - Letter from the owner dated 7 November 2018 reiterating the accuracy of the information in her letters of 21/10/09 and 24/9/15;
 - Statutory declaration of Radha Ghale, a patron of the owner's business, declared on 20 April 2016; recalling that the applicant had acted as her hairdresser on occasion;
 - Letter dated 2 November 2018 from Radha Ghale stating that she was a client of the owner's business;
 - Statutory declaration of Kamala Gurung declared 20 April 2016 confirming that the applicant had worked as a hairdresser at the owner's business;
 - Submission from the applicant's agent dated 19 November 2018 stating that the delegate denied the applicant procedural fairness for failing to provide reasoning for their decision in relation to the provision of a bogus document which was not identified. The submission attached the alleged notes of the department officer who telephoned the owner and the non-genuine report referring to the failure to prove the applicant worked at the business. The Tribunal notes that these documents are brief and lack detail.
11. The matter was listed for hearing on 26 November 2018 but was rescheduled to be heard on 26 February 2019.
12. The applicant appeared before the Tribunal on 26 February 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Sunimas Tamang, the applicant's sister, and the Tribunal attempted to contact the owner by telephone.
13. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.

14. At the hearing the applicant stated that she was undertaking an engineering degree and working for the owner to make money. She stated that she began as a trainee and after completing a beautician's course began to work as a trainee hairdresser. The training occurred on site. Once trained she began to cut hair blow dry hair and clean the salon. The applicant was not provided with a certificate of completion. She stated that she worked with the owner and 1-2 senior hairdressers. The applicant stated that she worked 6-7 days a week whilst attending her computer engineering course in the mornings. At the hearing the applicant acknowledged that her work was a week to week proposition. She stated that in Nepal there was a lack of payment formality and therefore records were not kept. She confirmed that she was paid weekly and that her salary was the same regardless of the specific activities she performed or the hours she worked. The applicant also stated that she worked at least 2-3 days a week. The applicant completed a certificate III in hairdressing in Australia..
15. The applicant stated that she told the owner that she needed her support in providing evidence that she had worked 900 hours for the owner. The owner therefore referred to this figure in her correspondence as the number of hours worked. The agent submitted that the figure of 900 hours was conservative.
16. On 7 March 2019 the agent sent to the Tribunal a letter from ACME Engineering College in Nepal dated 6 March 2019 and requested an extension of time in which to provide further documents.
17. On 19 March 2019 the agent sent to the Tribunal a further letter from ACME Engineering College in Nepal dated 11 March 2019 confirming that the applicant was a student there from 2005 to 2007.
18. On 20 March 2019 the agent sent a further letter from ACME Engineering College dated 19 March 2019 containing confirmation that the applicant was a student there from 2005 to 2007. This letter was submitted to support the applicant's contention that she was a student from 6 am to 11 am in the mornings and worked in the afternoons for the owner, as claimed.
19. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
20. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.886.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
22. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

23. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
24. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
25. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
26. The delegate did not identify with any specificity what document or information was bogus. The presumption appears to have been that because the payment and hours of employment could not be verified the application was rejected on the basis that there was a bogus document without identifying what was relied upon.
27. The explanations provided by the owner and the applicant as to the lack of formality in records to payment for a small Nepalese salon is entirely plausible. The failure to identify the "bogus document" means that the Tribunal cannot be sure as to which document or information the delegate was referring to. However, having considered the evidence before it the Tribunal is not satisfied that there is a bogus document or false or misleading information before it.
28. The Tribunal is satisfied that there is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular. Further there is no evidence before the Tribunal that the requirements of PIC 4020(1)(b) are relevant in this proceeding. Therefore the applicant has met PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

29. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is and if so, whether the applicant was under 18 at the time the application for the refused visa was made, such that PIC 4020(2) does not apply
30. There is no evidence before the Tribunal to suggest that this is the case in this matter and therefore, PIC 4020(2) does not apply.
31. On the basis that there is no evidence before the Tribunal that the applicant has not met PIC 4020(1) of schedule 4 of the regulations the applicant meets the criterion of cl.886.225.
32. The Tribunal remits the application for a Skilled (Residence) (Class VB) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 886 (Skilled - Sponsored) visa:
 - Public Interest Criterion 4020(1) for the purposes of cl.886.225 of Schedule 2 to the Regulations.

Danielle Galvin
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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